

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.  
CIVIL ACTION NO. MICV2003-2512

CROWN CASTLE ATLANTIC LLC	)
	)
Plaintiff	)
	)
vs.	)
	)
GUY A. MCKAY AND	)
SHERYLL MCKAY	)
	)
Defendants	)
	)

**STATEMENT OF FACTS AND LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT PURSUANT TO RULE 9A(b)(5)**

**STATEMENT OF FACTS**

1. On or about August 12, 1996, the McKays entered into a binding and enforceable Lease with Crown's predecessor-in-interest, Cellco Partnership d/b/a Bell Atlantic NYNEX Mobile ("BANM"). (Duval Aff. ¶ 6, Ex. 4; Def.'s Answer ¶ 4.)
2. The McKays, as Lessors, agreed to lease the Property – a sixty (60) foot by sixty (60) foot parcel of their land at 982-988 Main Street in North Acton, Massachusetts – to Crown's predecessor-in-interest, as Lessee, to the Lease for the purpose of "constructing, maintaining, and operating a communications facility and uses incidental thereto together with one (1) antenna structure and all necessary connecting appurtenances." (Duval Aff. ¶ 7, Ex. 4; Def.'s Answer ¶ 5.)
3. In the Lease, the McKays granted its Lessee "the non-exclusive right for ingress and egress, seven (7) days a week twenty-four (24) hours a day, on foot or motor vehicle, including trucks, and for installation and maintenance of underground utility wires, cables, conduits, and pipes under, or along a fifteen (15') foot wide right-of-way extending from the nearest public right-of-way, Main Street, to the demised premises,..." ("Right-of-Way"). (Duval Aff. ¶ 8, Ex. 4; Def.'s Answer ¶ 7.)
4. In the Lease, the McKays agreed that "[i]n the event any public utility is unable to use the aforementioned right-of-way, the Lessor hereby agrees to grant a substitute right-of-way either to the Lessee or to the public utility at no cost to the Lessee." The Lease further states that the "installation of all improvements shall be at the discretion and option of the Lessee." (Duval Aff. ¶ 8, Ex. 4; Def.'s Answer ¶¶ 7, 8.)

5. To provide for the necessary connection to the traditional landline telephone network, Crown's predecessor-in-interest BANM contracted with Mirra Construction to install the existing underground conduit and New England Telephone Company ("NETC") installed its copper wire telephone line through the underground conduit at the Property. (Barbadora Aff. ¶ 16.)
6. Mirra Construction installed the underground conduit running under the Right-of-Way from Main Street across the Property to the communications tower facility. (Barbadora Aff. ¶ 16.)
7. NETC installed the telephone line in the underground conduit running under the Right-of-Way from Main Street across the Property to the Tower. (Barbadora Aff. ¶ 16.)
8. BANM, by and through its contractor, Mirra Construction, installed the underground conduit running under the Right-of-Way from Main Street to the Property in the location on the Property requested by the McKays. (Barbadora Aff. ¶ 16.)
9. On November 10, 1997, the McKays and BANM executed a binding and enforceable First Amendment to the Lease ("First Amendment"). (Duval Aff. ¶ 10; Def.'s Answer ¶ 13.)
10. The First Amendment expressly provides that Crown has the right to sublet any portion of the Property, without the consent of the McKays to any third Party. (Duval Aff. ¶ 11, Ex. 4.)
11. By letter dated January 8, 1999 from Attorney Michael S. Giaimo of Robinson & Cole LLP, legal counsel for Bell Atlantic Mobile ("BAM"), the McKays were notified of BAM's formation of a joint venture with Crown Castle International Corp and the intent to assign BAM's interest in the Lease to the joint venture company, Crown. (Barbadora Aff. ¶ 17, Ex. 1; Def.'s Answer ¶ 31.)
12. The McKays were requested to accept, and agree to, the proposed assignment. (Barbadora Aff. ¶ 17, Ex. 1; Def.'s Answer ¶ 31.)
13. The McKays consented to the assignment of the Lease to Crown by signing a letter from BAM dated January 8, 1999. (Barbadora Aff. ¶ 18, Ex. 1; Def.'s Answer ¶ 32.)
14. On or about March 31, 1999, BAM assigned its interest in the Lease and corresponding subleases to Crown as evidenced by the Memorandum of Assignment. (Barbadora Aff. ¶ 19, Ex. 2; Def.'s Answer ¶ 33.)
15. The Tower is currently serviced by a copper wire telephone line that had been installed in an underground conduit from Main Street to a demarcation point within the wireless telecommunications compound. (Barbadora Aff. ¶ 10.)

16. Bell Atlantic n/k/a Verizon Communications informed Crown for reasons unknown to it that its predecessor NETC had not obtained the standard executed Easement Agreement with the McKays before the underground conduit and copper wire telephone lines were initially installed, and that the Easement Agreement would be necessary to install fiber optic telephone lines. (Barbadora Aff. ¶ 30.)
17. For a period in excess of three (3) years, Crown has repeatedly reminded the McKays that the Lease permitted Crown to upgrade the telephone lines at the Property and that the terms of the Lease required the McKays to sign the necessary Easement Agreement required by Verizon Communications. (Barbadora Aff. ¶ 33.)
18. As of this filing, despite repeated requests, the McKays have refused to execute an Easement Agreement with Verizon Communications. (Barbadora Aff. ¶ 43; Def.'s Answer ¶ 41.)
19. As of this filing, Verizon Communications has not installed the fiber optic telephone line to the Property needed by Crown's six (6) Subtenants in order to provide adequate coverage to their many wireless customers in the area who rely upon this service to make not only calls of convenience and business, but calls requesting emergency services. (Barbadora Aff. ¶ 44.)

### **STATEMENT OF LAW**

#### ***Breach of Contract***

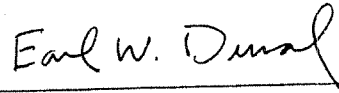
1. A lease is a contract for the possession of property. See Wesson v. Leone Enters., 774 N.E.2d 611, 619, 621 (Mass. 2002).
2. Covenants may be expressly contained in a lease or they may be implied from its language viewed in light of the intent of parties. See Stop & Shop, Inc. v. Ganem, 200 N.E.2d 248, 251 (Mass. 1964).
3. The undertakings of each promisor in a lease must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included. Stop & Shop, Inc., 200 N.E.2d at 251.
4. The grant of any thing [in a lease] carries an implication, that the grantee shall have all that is necessary to the enjoyment of the grant, so far as the grantor has power to give it. Winchester v. O'Brien, 164 N.E. 807, 809 (Mass. 1927).
5. The reality of a commercial lease "contemplates a continuing flow of necessary services from landlord to tenant, services that are normally under the landlord's control." Wesson, 774 N.E.2d at 621.
6. A tenant is entitled to relief if a landlord breaches a covenant contained in a lease. Wesson, 774 N.E.2d at 622.

7. A material breach of contract violates "an essential and inducing feature of the contract." Anthony's Pier Four, Inc. v. HBC Assocs., 583 N.E.2d 806, 819 (Mass. 1991).

### *Specific Performance*

8. Specific performance is an equitable remedy that may be granted within the sound discretion of the judge. Greenfield Country Estates Tenants Ass'n v. Deep, 666 N.E.2d 988, 993 (Mass. 1996).
9. Specific performance may be granted if it does not impose an undue hardship upon a party or permit a party to obtain an inequitable advantage. Greenfield Country Estates Tenants Ass'n, 666 N.E.2d at 994.
10. Although specific performance is generally not available to a party who can be adequately compensated at law, the availability of money damages does not bar a suit in equity for specific performance. Greenfield Country Estates Tenants Ass'n, 666 N.E.2d at 993.
11. Specific performance is appropriate in cases involving an interest in real property because real property is unique and money damages will often be inadequate to address a deprivation of an interest in land. Greenfield Country Estates Tenants Ass'n, 666 N.E.2d at 993.
12. Courts often grant specific performance in cases where a lessor breaches a covenant in a lease. Eg., Hook Brown Co. v. Farnsworth Press, Inc., 203 N.E.2d 681, 684-85 (Mass. 1965); Carey's, Inc. v. Carey, 517 N.E.2d 850, 856 (Mass. App. Ct. 1988); Leisure Sports Inv. Corp. v. Riverside Enter., Inc., 388 N.E.2d 719, 722 (Mass. App. Ct. 1979).

Respectfully Submitted,  
Crown Castle Atlantic LLC  
by its Attorneys,



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